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him to get the relief he seeks from the Sessions Judge. I do not think that this is sufficient. I can well conceive circumstances which might require that this Court should depart from its ordinary rule, and this is what is said in *Emperor* v. *Kali Charan*. I find no such circumstance in this case and therefore decline to exercise the power conferred by section 437 and reject the application. The applicant is of course at full liberty to apply to the Sessions Judge if he is so advised.

APPELLATE CIVIL.

1907
December 20

Before Sir John Stanley, Knight, Chief Justice, and Mr. Justice Sir William Burkitt.

HAIDAR HUSAIN AND OTHERS (DEFENDANTS) *v.* ABDUL AHAD AND ANOTHER (PLAINTIFFS).*

Civil Procedure Code, section 362—*Parties—Death of sole appellant.—All representatives not brought upon the record—Abatement of appeal.*

The sole appellant, a Muhammadan, died pending the appeal, leaving him surviving a widow, two sons and two daughters. The two sons applied to have themselves brought on to the record as appellants, but did not ask that their mother and sisters should be made parties to the appeal. An application to that effect made by the respondents was not acted upon by the lower appellate Court. *Held* that it was the duty of the sons to have brought upon the record, either as appellants or respondents, the other representatives of their father, and, as they had not done so, the appeal abated. *Ghamandi Lal* v. *Amir Begam* (1) followed.

ONE Muhammad Naki brought a suit in the Court of the Munsif of Rasra against several defendants asking for the demolition of certain constructions which he alleged the defendants to have wrongfully erected and for possession of the land on which they stood. The Munsif dismissed the suit. The plaintiff appealed, but died shortly after the appeal was filed. He left two sons, a widow and two daughters. The sons applied to be brought upon the record of the appeal in place of their father and were so brought, but made no attempt to have the other representatives of the plaintiff made parties to the appeal. The respondents did make an application to that effect; the other representatives were served with notice of this application, but paid no

* Second Appeal No. 506 of 1906, from a decree of Sheo Prasad, Additional Subordinate Judge of Ghazipur, dated the 9th of April 1906, reversing a decree of Manmohan Sanyal, Munsif of Rasra, dated the 31st of August 1905.

(1) (1894) I. L. R., 16 All., 211.

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attention to it, and the Court under the circumstances declined to add them as appellants and directed the hearing to proceed. The appeal was allowed and the plaintiff's claim decreed. The defendants appealed to the High Court.

Mr. *M. L. Agarwala*, for the appellants.

Mr. *Abdul Raoof* and Pandit *Moti Lal Nehru* for the respondents.

STANLEY, C.J., and BURKITT, J.—The suit out of which this second appeal has arisen was instituted by one Muhammad Naki. His suit was dismissed in the first Court, whereupon an appeal was filed by him, during the pendency of which he died leaving as his legal representatives, his widow, two sons and two daughters. The two sons applied to the Court to be brought upon the record as appellants, and they were so brought. Thereupon the defendants asked the Court to have the other representatives also brought upon the record. These representatives were served with notice of the application, but took no notice of it, and in view of their attitude the Court did not feel justified in adding them as appellants and declined to do so, directing that the hearing should proceed. It was obviously the duty of the two sons to apply to the Court to have the other representatives brought on the record either as appellants or as respondents but they neglected to take any steps in this direction. The result is that in accordance with the ruling of this Court in the case of *Ghamandi Lal* v. *Amir Begam* (1) the appeal abated. We had occasion to consider this ruling in the recent case of *Jugal Kishore* v. *The Collector of Bijnor* (2), and we approved of and followed it. It is too late now to ask us to pass an order upon the application of the defendants to bring the other representatives on the record, which was rejected by the Court below. The result is that the appeal to the lower appellate Court abated, and the decree obtained from that Court must be set aside and the decree of the Court of first instance restored with costs in all Courts.

Appeal decreed.

(1) (1894) I. L. R., 16 All., 211. (2) Second Appeal No. 52 of 1905.

1907
December 21.

Before Mr. Justice Banerji and Mr. Justice Aikman.

ISMDAR KHAN AND OTHERS (DEFENDANTS) *v.* AHMAD HUSAIN (PLAINTIFF) AND HABIB-ULLAH KHAN (DEFENDANT).*

Mortgage—Usufructuary mortgage—Ouster of mortgagees—Adverse possession.

One of the purchasers of the equity of redemption in a usufructuary mortgage ousted the mortgagees and took possession of the entire mortgaged property, which he retained for more than twelve years; but it was found that he never denied the mortgagors' title, and that the mortgagors had no right to present possession. *Held* that there was no adverse possession as against the other mortgagors, although there was as against the mortgagees, and that the right of redemption was not lost: the ouster of the mortgagees did not entitle the plaintiff to re-enter into possession. *Muhammad Husain* v. *Mul Chand* (1), *Chinto* v. *Janki* (2), *Bejoy Chunder Banerjee* v. *Kally Prosonno Mookerjee* (3) and *Vithoba* v. *Gangaram* (4) referred to.

THIS was a suit brought by one Ahmad Husain for possession of 9 bighas and odd biswas of land, being three-fifths of 15 bighas and odd, and for mesne profits. The land in suit formed part of a larger quantity of land, which was the holding at fixed rates of one Rashida Bibi and was mortgaged by her under two mortgages, one executed in favour of Bahadur Ali and Saadat Beg and the other in favour of Aiyam-ud-din Khan. The mortgages were usufructuary, and the mortgagees were put in possession. Rashida Bibi died, leaving as her heirs her daughters Najman Bibi and Rabuan Bibi, who sold their equity of redemption to the plaintiff Ahmad Husain and to the first defendant Ismdar Khan on the 21st of June 1877. The former was the purchaser of a three-fifths share and the latter of the remainder. Other transactions relating to the property took place subsequently, to which it is not necessary to refer for the purposes of this report. The plaintiff claimed possession of his three-fifths share in the land in question on the allegation that the defendant Ismdar Khan had wrongfully dispossessed the mortgagees and taken possession, not only of his own share but also of the share of the plaintiff. The suit was resisted on various grounds, the main plea being that the claim was barred by limitation, the

* Second Appeal No. 998 of 1905, from a decree of Tajammul Husain, Subordinate Judge of Ghazipur, dated the 28th of July 1905, confirming a decree of Harimohan Banerji, Munsif of Ghazipur, dated the 12th of January 1905.

(1) (1904) I. L. R., 27 All., 395.
(2) (1892) I. L. R., 18 Bom., 51.
(3) (1878) I. L. R., 4 Calc., 327.
(4) (1875) 12 Bom., H. C. Rep., 180.

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dispossession of the mortgagees having taken place in June 1878, whilst the suit was not filed until July 1904. The court of first instance (Munsif of Ghazipur) overruled this objection and gave the plaintiff a decree for possession, but disallowed his claim for mesne profits. On appeal the lower appellate court (Subordinate Judge of Ghazipur) affirmed the decree of the court of first instance. Both sides appealed to the High Court; the plaintiff against the disallowance of his claim for mesne profits, the defendants against the rest of the decree. The defendants urged that the suit was barred by limitation inasmuch as they had held possession adversely to the plaintiff for more than 12 years; and also that in any case the plaintiff was not entitled to possession without redeeming them.

Mr. *M. L. Agarwala*, for the appellants.

Mr. *Muhammad Ishaq Khan*, for the respondents.

BANERJI and AIKMAN,—JJ.—This appeal and the connected appeal No. 997 arise out of a suit brought by the plaintiff Ahmad Husain for possession of 9 bighas and odd biswas of land, being three-fifths of 15 bighas and odd, and for mesne profits. The said land forms part of a larger quantity of land, which was the holding at fixed rates of one Rashida Bibi and was mortgaged by her under two mortgages, one executed in favour of Bahadur Ali and Saadat Beg and the other in favour of Aiyam-ud-din Khan. The mortgages were usufructuary and the mortgagees were put in possession. Rashida Bibi died, leaving as her heirs her daughters Najman Bibi and Rabuan Bibi, who sold their equity of redemption to the plaintiff Ahmad Husain and to the first defendant Ismdar Khan on the 21st of June 1877. The former was the purchaser of a three-fifths share and the latter of the remainder. Other transactions relating to the property took place subsequently, to which it is not necessary to refer for the purposes of these appeals. The plaintiff claimed possession of his three-fifths share in the land in question on the allegation that the defendant Ismdar Khan had wrongfully dispossessed the mortgagees and taken possession, not only of his own share, but also of the share of the plaintiff. The suit was resisted on various grounds, the main plea being that the claim was barred by limitation. The court of first instance overruled this plea and made a decree in the

plaintiff's favour for possession, but dismissed the claim for mesne profits. This decree having been affirmed by the lower appellate Court these two appeals have been preferred, one by the plaintiff and the other by the defendants. The plaintiff appeals against the portion of the decree which dismisses his claim for mesne profits. The defendants' appeal relates to the remainder of the claim.

The contentions urged on behalf of the defendants are that they have held possession for more than twelve years adversely to the plaintiff and the claim is therefore time-barred, and that in any case the plaintiff cannot obtain possession without redeeming the defendants.

Upon issues being referred by us to the Court below, that Court has found that the mortgagees were dispossessed by Ismdar Khan defendant in June 1878, but that he never denied the plaintiff's title, but on the contrary admitted it in a written statement and in a deposition. We have examined the written statement and the deposition referred to and are of opinion that they do not contain any admission of title. We must, however, accept the findings that the defendants dispossessed the mortgagees in June 1878 and that they never specifically denied the plaintiff's title.

As the defendants wrongfully dispossessed the mortgagees and themselves took possession, their possession was undoubtedly adverse to the mortgagees, and as this adverse possession has continued for a longer period than twelve years, the right of the mortgagees has under section 28 of the Limitation Act become extinct and has vested in the defendants. The possession of the mortgagees was not full proprietary possession but was possession of a limited nature. It is this possession of which they were deprived by the defendants; so that the adverse possession of the defendants was also of a limited character and had the effect of extinguishing the limited interests of the mortgagees and vesting those interests in the defendants. The possession of the defendants was not therefore adverse to the plaintiff. There may be cases in which adverse possession against the mortgagee would also be adverse possession against the mortgagor, for example, where the mortgagor is entitled to immediate possession or where the possession of the trespasser is coupled with a denial of the title

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of the mortgagor. But, as held in *Muhammad Husain* v. *Mul Chand* (1) following *Chinto* v. *Janki* (2), possession obtained by the ouster of a mortgagee in possession is not necessarily adverse to the mortgagor also. In the present case it has been found that the title of the plaintiff was never denied by the defendants. It is also an admitted fact that when the defendants took possession the persons entitled to remain in possession were the mortgagees and not the mortgagors, and that the mortgage was unsatisfied. As the plaintiff had therefore no right to immediate possession, the defendants cannot be held to have been in possession adversely to the plaintiff. As observed by Mr. Justice Markby in *Bejoy Chunder Banerjee* v. *Kally Prosonno Mookerjee* (3), by adverse possession is meant possession by a person holding the land on his own behalf or on behalf of some preson other than the true owner, the true owner having a right to immediate possession. We are therefore unable to accept the defendants' contention that their possession is adverse to the plaintiff and that the claim is time-barred.

We are, however, of opinion that the plaintiff is not entitled to recover possession without redeeming the mortgages to which his share is subject. As we have already pointed out, the defendants by virtue of their adverse possession against the mortgagees, acquired the rights of the mortgagees, and, as held in *Vithoba* v. *Gangaram* (4), succeeded only to such estate as the mortgagees possessed. The plaintiff, therefore, can only redeem the defendants, his equity of redemption being unaffectd by the possession of the defendants. The ouster of the mortgagees by the defendants did not entitle the plaintiff to re-enter into possession. A similar view was held by Fulton, J., in *Chinto* v. *Janki* (5). It is true the position of the defendants is that of co-mortgagors, but that circumstance does not, in our opinion, make any difference so far as the interests of the plaintiffs are concerned, it being an admitted fact that the mortgages have not been discharged. The claim for possession was not therefore maintainable. As the plaintiff did not seek to redeem the mortgages, the suit as brought ought to have been dismissed. This will not preclude

(1) (1904) I. L. R., 27 All., 395.
(2) (1892) I. L. R., 18 Bom., 51.
(3) (1878) I. L. R., 4 Calc., 327.
(4) (1875) 12 Bom., H. C. Rep., 180.
(5) (1892) I. L. R., 18 Bom., 51, at p. 54.

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the plaintiff from bringing a properly framed suit for redemption. We accordingly allow this appeal, and, setting aside the decree of the Court below, dismiss the plaintiff's suit. Having regard to the circumstances of the case and the conduct of the parties we direct that they abide their own cost in all Courts.

Appeal decreed.

APPELLATE CIVIL.

1908
January 2.

Before Mr. Justice Sir George Knox and Mr. Justice Aikman.

AJUDHIA AND OTHERS (DEFENDANTS) *v.* KUNJAL (PLAINTIFF) AND GAURI SHANKAR AND ANOTHER (DEFENDANTS).*

Bond—Instalments—Power to sue for whole amount on default of payment—Limitation—Act No. XV of 1877 *(Indian Limitation Act), schedule II, article* 75.

A bond payable by instalments contained a provision that in default of the payment of any one instalment it would be in the power of the creditor to sue for the whole amount due under the bond without waiting for the period provided for the payment of other instalments. *Held* that this provision did not mean that the creditor should be compelled to sue for the whole on default of payment of one instalment, nor did limitation in respect of the whole debt commence to run from the date of the first default. *Jadab Chandra Bakshi* v. *Bhairab Chandra Chuckerbutty* (1) and *Hurri Pershad Chowdhry* v. *Nasib Singh* (2) dissented from. *Shankar Prasad* v. *Jalpa Prasad* (3) and *Maharaja of Benares* v. *Nand Ram* (4) referred to.

THE facts of this case are as follows :—

On the 3rd of August 1891 one Debia, the father of some of the defendants, executed a bond payable by instalments of Rs. 50 annually in the month of Jeth in favour of Kashi Prasad. In May 1905 Kashi Prasad's representatives sold this bond to the plaintiff Kunjal. On the 21st of June 1905 Kunjal sued, making the representatives of the original obligor and obligees parties, to recover three instalments under the bond. The bond contained a provision that, in default of payment of any one instalment, it would be within the power of the creditor (*mahajan mazkurko ikhtyar hoga*) to sue for the whole amount due under the bond

* Second Appeal No. 489 of 1906, from a decree of Bepin Behari Mukerji, Judge of the Court of Small Causes exercising powers of a Subordinate Judge of Cawnpore, dated the 30th of April 1906, modifying a decree of Muhammad Azimuddin, Munsif of Fatehpur, dated the 18th of September 1905.

(1) (1904) I. L. R., 31 Calc., 297.
(2) (1894) I. L. R., 21 Calc., 542.
(3) (1894) I. L. R., 16 All., 371.
(4) (1907) I. L. R., 29 All., 431.